

APPENDIX

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A. Excerpt from Amicus Curiae Brief Submitted by The National Joint Board for the Settlement of Jurisdictional Disputes to the National Labor Relations Board in Matter of Wood, Wire and Metal Lathers and Acoustical Contractors Association, Case No. 8-CD-8, pages 59 to 63, July 31, 1957.

It is the considered opinion of the Joint Board that the doctrine of the *Los Angeles Building and Construction Trades* case is a serious, continuing threat to the success of the Joint Board, and that the widespread application of the doctrine would precipitate increased jurisdictional warfare.

One reason for this conviction is the awareness that the doctrine is a constant temptation to contractors to disassociate themselves from the Joint Board. A contractor who adheres to Joint Board procedures runs the risk of decisions that are not to his liking. In theory a non-adhering contractor can make assignments at his pleasure and the NLRB will prevent economic action by the disappointed union. Confronted with these choices an inexperienced lawyer might well advise clients not to stipulate that they will be bound by the Joint Board procedures. More experienced contractors realize that the theoretical protection afforded is often slow or ineffective. They know that what they lose by one Joint Board decision, they may gain by another. They value the coherence of the industry and have faith in self-government. Thus far these factors have been sufficient to bring very wide support for the Joint Board but so long as the *Los Angeles Building and Construction* case stands, there will be the risk of secession by a dissatisfied group. For example, a group of mechanical contractors might bitterly complain of Joint Board rulings assigning air conditioning units to sheet metal workers instead of steamfitters. They would not long remain unaware of the NLRB doctrine. If no other jurisdictional disputes which involved them were brewing, why

should they not withdraw from the Joint Board, make assignments more to their liking, and carry the issue to the NLRB if strikes resulted. They might be joined by unions with parallel interests. The resignation of a single group would not cause serious damage standing alone, but the snowballing effects must not be neglected. If any important group withdraws, other groups are affected and their incentive to adhere to the procedures is greatly lessened.

The second reason for regarding the doctrine of the *Los Angeles Building and Construction Trades* case as a potential threat to the stability of the construction industry is that vesting the power to determine jurisdictional disputes in contractors, puts it in the power of a few contractors to disturb the customs and established practices of the industry. For half a century jurisdictional disputes have been resolved by building trades unions through interpretation of their charters, awards by the AFL Building and Construction Trades Department, the Joint Board and national and local agreements. To give a contractor power to disregard these arrangements not only disturbs established habits but tends to revive jurisdictional differences once settled. For example, the unfortunate dispute between the Carpenters and the Laborers over the removal of concrete forms has been settled by an agreement negotiated between the two unions. If some contractor, through ignorance or perversity, were to make an assignment to laborers inconsistent with the terms of that agreement, the individual carpenters could scarcely be expected to sit quietly by. Of course, concerted action to enforce the agreement would violate Section 8(b)(4)(D) and in due course an injunction might issue, but the fear of an injunction is not likely to prevent the concerted action. One cannot banish strikes by men who feel deeply aggrieved merely by passing a law that there shall be none. Furthermore, if a contractor may deprive carpenters of work assigned to them by the agreement, is it not likely that the carpenters will seek to persuade other contractors to give

them work assigned to the laborers by the agreement? Thus the whole controversy would be gradually reopened. The example could be multiplied into hundreds of similar instances.

Since the clash of interest in a jurisdictional controversy often involves not only differences between two craft unions but also differences between general and specialty contractors, or between different specialty contractors, contractors are entitled to a voice in the decision. In times of slack employment, however, the assignment of disputed work to one craft rather than another may well award the former sufficient job opportunities and deprive the latter of needed employment. It is contrary to the basic philosophy of collective bargaining to deny employees the opportunity to participate effectively in making decisions so important to their own interests.

Furthermore, although the public interest demands the prompt resolution of jurisdictional questions without the stoppage of work, there is no public interest in vesting contractors with the final power of decision. Once in a while the work assignment may make a difference in cost or efficiency but these are rarely significant factors.

The jurisdictional disputes in the construction industry are essentially controversies between employees following different crafts or callings. All the employees have chosen their bargaining representatives. Neither their choice nor their union membership or non-membership will be affected by a decision on the merits of the jurisdictional dispute. Unlike the situation in *Moore Drydock Co.*, 81 NLRB 1108 (1949), where the Board feared the establishment of an unlawful closed shop if it made a determination in favor of either *uniop*, true inter-craft controversies can be decided on the basis of craft rights without regard to union membership. A single illustration will make the distinction clear. Suppose that a jurisdictional dispute broke out between the International Union of Operating Engineers and the International Brotherhood of Electrical Workers over the work of unloading electrical equipment with A-

frame trucks. The NLRB could not properly assign the work to the members of either union but in the absence of an agreement to submit the issue to the Joint Board it could, and should, determine whether the work was to be done by men who follow the trade of operating engineer or the calling of electrician. If all the employees are union members the distinction may seem to lack practical significance. Legally the difference is highly important. Awarding the work to electricians would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policies of Sections 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions.

It may be objected that accepting the *Hake* decision would involve the NLRB in the morass of having to decide jurisdictional disputes upon their merits. The task would indeed be frightening and the workload might be killing if the Board sought to develop a whole new set of decisional standards. When the Joint Board was originally established, however, the NLRB Chairman and the General Counsel contemplated deciding such cases according to the customs and practices of the industry (not inconsistent with the public interest) as shown by the charters of labor organizations, voluntary national and local agreements, trade practice and the decisions of various bodies established for the settlement of jurisdictional disputes. Accordingly the Joint Board Agreement authorizes the chairman to appear as an expert witness in NLRB cases.

Through this procedure the jurisdictional decisions of the NLRB could be made to parallel the Joint Board rulings. The constant temptation to look for more favorable action from the NLRB would be eliminated, and both contractors and unions would eschew government intervention in favor of an agency of industrial self-government. The Joint Board would be strengthened. The risk of miring the NLRB in a morass of jurisdictional disputes would be greatly reduced.

B. Legislative History of Sections 8 (b) (4) (D) and 10(k), National Labor Relations Act, as amended.

H. R. 3020, as reported.

Sec. 12 (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

• • • • (3) Calling, authorizing, engaging in, or assisting—

(A) any . . . jurisdictional strike . . .

[Section 2] (15) The term "jurisdictional strike" means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class.

S. 858 (Morse Bill), II Leg. Hist. 985-87

• • • • [4] (b) It shall be an unfair labor practice for a labor organization or its agents—

(2) To engage, or to induce or encourage the employees of any employer to engage, in a strike or in a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, in the course of their employment (A) because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization.

• • • • [6] (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (2) (A) of section 8 (b), the Board is empowered to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satis-

factory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

S. 1126, as reported.

[8] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment . . . (4) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order of certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks . . .

House Conference Report No. 510, on H. R. 3020

[8] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade,

craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

• • • •

[10] (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

C. National Labor Relations Board Rules and Regulations Series 6, as amended, 1956.

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Subpart E—Procedure to Hear and Determine Disputes Under Section 10 (k) of the Act

Sec. 102.71 *Initiation of proceedings; notice of filing charge; notice of hearing.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the regional director shall investigate such charge, giving it priority over all other cases in the office except cases under paragraph (4) (A), (4) (B), and (4) (C) of section 8 (b) and other cases under paragraph (4) (D) of section 8 (b). If it appears to the regional director that further proceedings should be instituted, he shall cause to be served on all parties to the dispute out of which such unfair labor practice may have arisen a notice of the filing of said charge together with a notice of hearing before a hearing officer at a time and place fixed therein which shall be not less

than 10 days after service of the notice of hearing. The notice of hearing shall contain a simple statement of the issues involved in such dispute.

Sec. 102.72 Adjustment of dispute; withdrawal of notice of hearing; hearing.—If, within 10 days after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted or agreed upon methods of voluntary adjustment of the dispute, the regional director shall withdraw the notice of hearing and shall dismiss the charge. Hearings shall be conducted by a hearing officer and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.56 to 102.59, inclusive.

Sec. 102.73 Proceedings before the Board; further hearings; briefs; certification.—Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, to certify the labor organization or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board at Washington, D. C., within 7 days after the close of the hearing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed, and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and copies thereof shall immediately be served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

Sec. 102.74 Compliance with certification; further proceedings.—If, after issuance of certification by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the certification,

the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director may proceed with the charge under paragraph (4) (D) of sections 8 (b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

Sec. 102.75 *Review of Certification.*—The record of the proceeding under section 10 (k) and the certification of the Board thereon, shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10 (e) and (f) of the act.

D. Statements of Procedure

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Subpart E—Jurisdictional Dispute Cases Under Section 10 (k) of the Act

Sec. 101.26 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10 (k).*—The investigation of a jurisdictional dispute under section 10 (k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4) (D) of section 8 (b).

Sec. 101.27 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*—These matters are handled as described in section 101.3 to 101.7, inclusive. Cases involving violation of paragraph (4) (D) of section 8 (b) are given priority over all other cases in the office except cases under paragraphs (4) (A), (4) (B), and (4) (C) of section 8 (b).

Sec. 101.28 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that further proceedings should be instituted, he issues a notice of filing of the charge together with a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties

to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of hearing. If, within 10 days after service of the notice of hearing, the parties present to the regional director satisfactory evidence that they have adjusted or agreed upon methods of voluntary adjustment of the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfactory method to resolve the dispute.

Sec. 101.29 Hearing.—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence but makes no recommendations in regard to resolution of the dispute.

Sec. 101.30 Procedure before the Board.—The parties have 7 days after the close of the hearing to file briefs with the Board and to request oral argument which the Board may or may not grant. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its certification of the labor organization or the particular trade, craft, or class of employees which shall perform the particular work tasks in issue.

Sec. 101.31 Compliance with certification; further pro-

ceedings.—After the issuance of certification by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conference may be held for the purpose of working out details. If the regional director is satisfied that parties are complying with the certification, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8 (b) (4) (D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15.

SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1960.

National Labor Relations Board,
Petitioner,

v.

Radio and Television Broadcast
Engineers Union, Local 1212,
International Brotherhood of
Electrical Workers, AFL-CIO.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[January 9, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

This case, in which the Court of Appeals refused to enforce a cease-and-desist order of the National Labor Relations Board, grew out of a "jurisdictional dispute" over work assignments between the respondent union composed of television "technicians,"¹ and another union, composed of "stage employees."² Both of these unions were certified bargaining agents for their respective Columbia Broadcasting System employee members and had collective bargaining agreements in force with that company, but neither the certifications nor the agreements clearly apportioned between the employees represented by the two unions the work of providing electric lighting for television shows. This led to constant disputes, extending over a number of years, as to the proper assignment of this work, disputes that were particularly acrimonious with reference to "remote lighting," that is, lighting for telecasts away from the home studio. Each

¹ Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO.

² Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

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union repeatedly urged Columbia to amend its bargaining agreement so as specifically to allocate remote lighting to its members rather than to members of the other union. But, as the Board found, Columbia refused to make such an agreement with either union because "the rival locals had failed to agree on the resolution of this jurisdictional dispute over remote lighting."³ Thus feeling itself caught "between the devil and the deep blue,"⁴ Columbia chose to divide the disputed work between the two unions according to criteria improvised apparently for the sole purpose of maintaining peace between the two. But, in trying to satisfy both of the unions, Columbia has apparently not succeeded in satisfying either. During recent years, it has been forced to contend with work stoppages by each of the two unions when a particular assignment was made in favor of the other.⁵

³ The other major television broadcasting companies have also been forced to contend with this same problem. The record shows that there has been joint bargaining on this point between Columbia, National and American Broadcasting Systems on the one hand and the unions on the other. All the companies refused to allocate the work to either union because the unions did not agree among themselves. Columbia's vice president in charge of labor relations explained the situation in these terms: "All three companies negotiating jointly here took the position that they could not do this. They could not give exclusive jurisdiction because each of them had a conflicting claim from another union." See also *National Association of Broadcast Engineers*, 105 N. L. R. B. 355.

⁴ This phrase was used by the Hearing Examiner to describe the position of Columbia as explained by its Vice President in charge of labor relations.

⁵ See *Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees*, 124 N. L. R. B. 249, for a report of a recent jurisdictional strike against Columbia by the same stage employees' union involved here which resulted from an assignment of remote lighting work favorable to the technicians.

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The precise occasion for the present controversy was the decision of Columbia to assign the lighting work for a major telecast from the Waldorf-Astoria Hotel in New York City to the stage employees. When the technicians' protest of this assignment proved unavailing, they refused to operate the cameras for the program and thus forced its cancellation.⁶ This caused Columbia to file the unfair labor practice charge which started these proceedings, claiming a violation of § 8 (b)(4)(D) of the Taft-Hartley Act.⁷ That section clearly makes it an unfair labor practice for a labor union to induce a strike or a concerted refusal to work in order to compel an employer to assign particular work to employees represented by it rather than to employees represented by another union, unless the employer's assignment is in violation of "an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."⁸ Obviously, if § 8 (b)(4)(D) stood alone, what this union did in the absence of a Board order or certification entitling its members to be assigned to these particular jobs would be enough to support a finding of an unfair labor practice in a normal proceeding

⁶ Respondents, for the purposes of this proceeding only, concede the correctness of a Board finding to this effect.

⁷ 29 U. S. C. § 158 (b)(4)(D).

⁸ "Section 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

(4) . . . to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

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under § 10 (c) of the Act.⁹ But when Congress created this new type of unfair labor practice by enacting § 8 (b)(4)(D) as part of the Taft-Hartley Act in 1947, it also added § 10(k) to the Act.¹⁰ Section 10 (k), set out below,¹¹ quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions. Accordingly, § 10 (k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes. And even where no voluntary adjustment is made, "the Board is empowered and directed," by § 10 (k), "to hear and determine the dispute out of which such unfair labor practice shall have arisen," and upon compliance by the disputants with the Board's decision the unfair labor practice charges must be dismissed.

In this case respondent failed to reach a voluntary agreement with the stage employees union so the Board held the § 10 (k) hearing as required to "determine the dispute." The result of this hearing was a decision that the respondent union was not entitled to have the work assigned to its members because it had no right to it under either an outstanding Board order or certification, as provided in § 8 (b)(4)(D), or a collective bargaining

⁹ 29 U. S. C. § 160(c).

¹⁰ 29 U. S. C. § 160 (k).

¹¹ "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

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agreement.¹² The Board refused to consider other criteria, such as the employer's prior practices and the custom of the industry, and also refused to make an affirmative award of the work between the employees represented by the two competing unions. The respondent union refused to comply with this decision, contending that the Board's conception of its duty "to determine the dispute" was too narrow in that this duty is not at all limited, as the Board would have it, to strictly legal considerations growing out of prior Board orders, certifications or collective bargaining agreements. It urged, instead, that the Board's duty was to make a final determination, binding on both unions, as to which of the two union's employees was entitled to do the remote lighting work, basing its determination on factors deemed important in arbitration proceedings, such as the nature of the work, the practices and customs of this and other companies and of these and other unions, and upon other factors deemed relevant by the Board in the light of its experience in the field of labor relations. On the basis of its decision in the § 10 (k) proceeding and the union's challenge to the validity of that decision, the Board issued an order under § 10 (c) directing the union to cease and desist from striking to compel Columbia to assign remote lighting work to its members. The Court

¹² This latter consideration was made necessary because the Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of § 8 (b)(4)(D) despite the fact that the language of that section contains no provision for special treatment of such strikes. See *Local 26, International Fur Workers*, 90 N. L. R. B. 1379. The Board has explained this position as resting upon the principle that "to fail to hold as controlling . . . the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8 (b)(4)(D) is intended to prevent." *National Association of Broadcast Engineers, supra*, n. 3, at 364.

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of Appeals for the Second Circuit refused to enforce the cease-and-desist order, accepting the respondent's contention that the Board had failed to make the kind of determination that § 10 (k) requires.¹³ The Third,¹⁴ and Seventh¹⁵ Circuits have construed § 10 (k) the same way, while the Fifth Circuit¹⁶ has agreed with the Board's narrower conception of its duties. Because of this conflict and the importance of this problem, we granted certiorari.¹⁷

We agree with the Second, Third and Seventh Circuits that § 10 (k) requires the Board to decide jurisdictional disputes on their merits and conclude that in this case that requirement means that the Board should affirmatively have decided whether the technicians or the stage employees were entitled to the disputed work. The language of § 10 (k), supplementing § 8 (b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words "hear and determine the dispute" convey not only the idea of hearing but also the idea of deciding a controversy. And the clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8 (b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. To determine or settle the dispute as between them would normally require a decision that one or the other is entitled to do the work in dispute. Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little

¹³ 272 F. 2d 713.

¹⁴ *N. L. R. B. v. Union Association of Journeymen*, 242 F. 2d 722.

¹⁵ *N. L. R. B. v. United Brotherhood of Carpenters*, 261 F. 2d 166.

¹⁶ *N. L. R. B. v. Local 450, International Union of Operating Engineers*, 275 F. 2d 413.

¹⁷ 363 U. S. 802.

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interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer. The § 10(k) hearing would therefore accomplish little but a restoration of the pre-existing situation, a situation already found intolerable by Congress and by all parties concerned. If this newly granted Board power to hear and determine jurisdictional disputes had meant no more than that, Congress certainly would have achieved very little to solve the knotty problem of wasteful work stoppages due to such disputes.

This conclusion reached on the basis of the language of § 10(k) and § 8(b)(4)(D) is reinforced by reference to the history of those provisions. Prior to the enactment of the Taft-Hartley Act, labor, business and the public in general had for a long time joined in hopeful efforts to escape the disruptive consequences of jurisdictional disputes and resulting work stoppages. To this end unions had established union tribunals, employers had established employer tribunals, and both had set up joint tribunals to arbitrate such disputes.¹⁸ Each of these

¹⁸ For a review and criticism of some of these efforts, see Dunlop, *Jurisdictional Disputes*, N. Y. U. 2d Ann. Conference on Labor 477, at 494-504.

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efforts had helped some but none had achieved complete success. The result was a continuing and widely expressed dissatisfaction with jurisdictional strikes. As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues."¹⁹ And the House Committee report on one of the proposals out of which these sections came recognized the necessity of enacting legislation to protect employers from being "the helpless victims of quarrels that do not concern them at all."²⁰

The Taft-Hartley Act as originally offered contained only a section making jurisdictional strikes an unfair labor practice. Section 10 (k) came into the measure as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either "to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute."²¹ That the purpose of this amendment was to set up machinery by which the underlying jurisdictional dispute would be settled is clear and, indeed, even the Board concedes this much. The authority to appoint an arbitrator

¹⁹ 83 Cong. Rec. 136.

²⁰ H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 23, I Legislative History of the Labor Management Relations Act, 1947, at 314 [hereinafter cited as Leg. Hist.].

²¹ The amendment was contained in a bill (S. 858) offered by Senator Morse, which also contained a number of other proposals. 93 Cong. Rec. 1913, II Leg. Hist. 987.

passed the Senate²² but was eliminated in conference,²³ leaving it to the Board alone "to hear and determine" the underlying jurisdictional dispute. The Board's position is that this change can be interpreted as an indication that Congress decided against providing for the compulsory determination of jurisdictional disputes. We find this argument unpersuasive, to say the very least. The obvious effect of this change was simply to place the responsibility for compulsory determination of the dispute entirely on the Board, not to eliminate the requirement that there be such a compulsory determination. The Board's view of its powers thus has no more support in the history of § 10 (k) than it has in the language of that section. Both show that the section was designed to provide precisely what the Board has disclaimed the power to provide—an effective compulsory method of getting rid of what were deemed to be the bad consequences of jurisdictional disputes.

The Board contends, however, that this interpretation of § 10 (k) should be rejected, despite the language and history of that section. In support of this contention, it first points out that § 10 (k) sets forth no standards to guide it in determining jurisdictional disputes on their merits. From this fact, the Board argues that § 8 (b)(4)(D) makes the employer's assignment decisive unless he is at the time acting in violation of a Board order or certification and that the proper interpretation of § 10 (k) must take account of this right of the employer. It is true, of course, that employers normally select and assign their own individual

²² I Leg. Hist. 241, 258-259. See also the Senate Committee Report on the bill, S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, I Leg. Hist. 414.

²³ H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, I Leg. Hist. 561.

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employees according to their best judgment. But here, as in most situations where jurisdictional strikes occur, the employer has contracted with two unions, both of which represent employees capable of doing the particular tasks involved. The result is that the employer has been placed in a situation where he finds it impossible to secure the benefits of stability from either of these contracts, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy them. Thus, it is the employer here, probably more than anyone else, who has been and will be damaged by a failure of the Board to make the binding decision that the employer has not been able to make. We therefore are not impressed by the Board's solicitude for the employer's right to do that which he has not, and most likely will not, be able to do. It is true that this forces the Board to exercise under § 10 (k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

The Board also contends that respondent's interpretation of § 10 (k) should be avoided because that interpretation completely vitiates the purpose of Congress to

encourage the private settlement of jurisdictional disputes. This contention proceeds on the assumption that the parties to a dispute will have no incentive to reach a private settlement if they are permitted to adhere to their respective views until the matter is brought before the Board and then given the same opportunity to prevail which they would have had in a private settlement. Respondent disagrees with this contention and attacks the Board's assumption. We find it unnecessary to resolve this controversy for it turns upon the sort of policy determination that must be regarded as implicitly settled by Congress when it chose to enact § 10 (k). Even if Congress has chosen the wrong way to accomplish its aim, that choice is binding both upon the Board and upon this Court.

The Board's next contention is that respondent's interpretation of § 10 (k) should be rejected because it is inconsistent with other provisions of the Taft-Hartley Act. The first such inconsistency urged is with §§ 8 (a)(3) and 8 (b)(2)²⁴ of the Act on the ground that the determination of jurisdictional disputes on their merits by the Board might somehow enable unions to compel employers to discriminate in regard to employment in order to encourage union membership. The argument here, which is based upon the fact that § 10 (k), like § 8 (b)(4)(D), extends to jurisdictional disputes between unions and unorganized groups as well as to disputes between two or more unions, appears to be that groups represented by unions would almost always prevail over nonunion groups in such a determination because their claim to the work would probably have more basis in custom and tradition than that of unorganized groups. No such danger is present here, however, for both groups of employees are represented by unions. Moreover, we feel

²⁴ 29 U. S. C. §§ 158 (a)(3) and 158 (b)(2).

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entirely confident that the Board, with its many years of experience in guarding against and redressing violations of §§ 8 (a)(3) and 8 (b)(2), will devise means of discharging its duties under § 10 (k) in a manner entirely harmonious with those sections. A second inconsistency is urged with § 303 (a)(4) of the Act,²³ which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303 (a)(4) does not permit a union to establish, as a defense to an action for damages under that section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between § 303 (a)(4) on the one hand and §§ 8 (b)(4)(D) and 10 (k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes.²⁴ Since we do not require a "substantive symmetry" between the two, we need not and do not decide what effect a decision of the Board under § 10 (k) might have on actions under § 303 (a)(4).

The Board's final contention is that since its construction of § 10 (k) was adopted shortly after the section was added to the Act and has been consistently adhered to since, that construction has itself become a part of the statute by reason of congressional acquiescence. In support of this contention, the Board points out that Congress has long been aware of its construction and yet has not seen fit to adopt proposed amendments which would have changed it. In the ordinary case, this argument might have some weight. But an administrative construction adhered to in the face of consistent rejection by

²³ 29 U. S. C. § 187 (a)(4).

²⁴ *International Longshoremen's Union v. Jureau Spruce Corp.*, 342 U. S. 237.

Courts of Appeals is not such an ordinary case. Moreover, the Board had a regulation on this subject from 1947 to 1958 which the Court of Appeals for the Seventh Circuit thought, with some reason, was wholly inconsistent with the Board's present interpretation.²⁷ With all this uncertainty surrounding the eventual authoritative interpretation of the existing law, the failure of Congress to enact a new law simply will not support the inference which the Board asks us to make.

We conclude therefore that the Board's interpretation of its duty under § 10 (k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. Having failed to meet that responsibility in this case, the Board could not properly proceed under § 10 (c) to adjudicate the unfair labor practice charge. The Court of Appeals was therefore correct in refusing to enforce the order which resulted from that proceeding.

Affirmed.

²⁷ See *N. L. R. B. v. United Brotherhood of Carpenters*, *supra*, at 170-172. The Rules and Regulations adopted in 1947 by the Board provided that in § 10 (k) proceedings, the Board was "to certify the labor organization or the particular trade, craft, or class of employees, as the case may be, *which shall perform the particular work tasks in issue*, or to make other disposition of the matter." (Emphasis supplied.) 29 CFR, 1957 Supp., § 102.53. This rule remained in effect until 1958.